

ETHICS COMMISSION  
**CITY AND COUNTY OF HONOLULU**

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PETER B. CARLISLE  
MAYOR



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**Advisory Opinion No. 2011-7**

Re: Your request for advice, EC No. 11-171

Dear []<sup>I</sup>:

This advisory opinion responds to your question regarding a possible conflict of interest between your duties as [city position] ("Officer") and your indirect financial interest in your [spouse's] ("Spouse") income from and ownership of [a business] ("Business X").

In summary, the Commission finds that you would have a conflict of interest should you participate in matters where Business X represents clients in matters involving the city. In each such matter, you should disclose the conflict of interest, abstain from participating in the matter, and delegate authority in the matter to the appropriate departmental employee. The same process should be followed where a reasonable person would question your impartiality based on a close personal relationship with anyone representing clients in matters involving the city.

**I. Facts**

On [date], you became a city Officer. Spouse is a director and stockholder of Business X. Business X represents clients in matters who have interests that come before you for your official action. [Description of matters.]

You are aware of the conflict of interest arising from Spouse's financial interest in Business X. However, you note it is part of your official duties to participate in all matters, including those where Business X represents a client in matters involving the city.

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The Ethics Commission has redacted information identifying the requester to prevent an unwarranted invasion of personal privacy and/or frustration of a legitimate government purpose in violation of HR.S Sec. 92F-13(1), (3).

You offer three steps to avoid the conflict of interest while still participating in matters where Business X represents clients in matters involving the city. First, you suggest that Business X would set up an "accounting wall" to separate the revenues received by Business X from clients in matters involving the city. Under this approach, no revenues from Business X's client's that have matters involving the city would be attributed to Spouse's share of the revenue of Business X. As a result, Spouse would not receive the financial benefit of the money received by Business. X from a client involved in a matter with the city. [Provides an example of situation.]

Second, Spouse would not participate in any Business X matters involving the city.

Third, you would be prohibited by RCH Sec. 11-102.1(b) and [additional rules] from disclosing any confidential information regarding city matters to Spouse.

### **Issue**

May you participate in matters where Business X represents clients in matters involving the city using the proposed safeguards without creating a conflict of interest in violation of the city's ethics laws when Spouse is. an owner of Business X?

## **III. Discussion**

### **A. Conflict of interest based on your financial interest in Spouse's (1) income, and (2) ownership of Business X**

The conventional approach to deal with a conflict of interest is to ensure the city official divests the personal interest or is removed from participating in the conflicted matter. An example of divestiture is selling or transferring a business in circumstances where the business may affect the official's decision making. Alternatively, the city official may not participate in the matter that may affect the official's personal interest. If he or she did so, it would violate the prohibition against conflicts of interest.

RCH Sec. 11-102.1(c) prohibits a city officer or employee from "[e]ngag[ing] in any business transaction or activity or hav[ing] a financial interest, direct or indirect, which is incompatible with the proper discharge of such person's official duties or which may tend to impair the independence of judgment in the performance of such person's official duties." (Emphasis added.) No showing of actual impairment is needed to support a violation under RCH Sec. 11-102.1(c). The reasonable appearance of impairment through conflicting loyalties is sufficient to establish a violation. See e.g., Advisory Opinion No. 2001-6 (likelihood of real conflict of interest is sufficient to establish a violation of RCH Sec. 11-102(c)); Advisory Opinion No. 158 (possibility of real conflict of interest arising is sufficient to establish a violation of RCH Sec. 11-102(c)).

The Commission applies an objective standard under RCH Sec. 11-102.1(c). That is, it determines whether under the totality of the circumstances a reasonable member of the public would perceive that the business activity or financial interest of the officer or employee ". . . may tend to impair the independence of judgment in the performance of [his/her] official duties." RCH Sec. 11-102.1(c); Advisory Opinion No. 2008-1. As the Commission has stated:

One purpose of the ethics laws is to prevent conflicts of interest because city officers and employees should not *serve* two masters. Therefore, the Commission has regularly required city officers and employees to forego activities that are likely to place them in a position where conflicts will arise. These limitations are imposed without a finding that the officers or employees would allow themselves to be swayed by the personal or financial interest because such an analysis is inherently subjective and unreliable. Instead, the objective standard used is whether a reasonable person, given all the facts, would conclude that the officer's independent judgment may tend to be impaired.

Advisory Opinion No. 200.1-2 (.citations omitted).

The accounting wall appears sufficient to. remove your interest in the. income from Business X's clients who have matters involving the city because Spouse will not receive the benefit of that income. It appears that, at least in theory,<sup>2</sup> the accounting wall would prevent any income from matters involving the city from being credited to Spouse for purposes of his or her salary, pension or profit sharing. So, your interest in the revenue from matters involving the city would also be. removed.

Yet,. the Commission is concerned that the accounting wall will not eliminate the reasonable perception of the public that your independent judgment may be impaired because of Spouse's interest in maintaining her ownership in Business X.

ROH Sec. 3-8.1 defines "financial interest" for ethics purposes to mean an interest held by an individual, the individual's spouse or minor children which is: (1) an ownership interest in a business; . . . or (6) a directorship or officership in a business." Spouse's ownership interest in Business X fits this definition.

Advisory Opinion No. 2002-1 is instructive here. In that case, a city officer's spouse owned a business that represented groups with interests directly affected by the work of the city officer. The Commission required that the city officer not participate in any matter involving the spouse's clients, to delegate those duties to

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<sup>2</sup> Staff has not reviewed the specifics of how the accounting wall would work.

subordinates and not to disclose any confidential city information to the spouse. The Commission recognized that the only way to be sure that the conflict did not influence the city officer was to deny the officer the city position. However, the Commission believed that doing so was not warranted when less severe options (that is, recusal and delegation of duties) were available.

In Advisory Opinion No. 2008-1, the Commission found a disqualifying conflict of interest where a board member owned an engineering firm that had been retained for a "six figure" fee by a law firm in a proceeding unrelated to the matter before the board, and one of the law firm's partners was a petitioner before the board. The Commission reasoned:

The question at hand is whether [the Board Member's] financial interest — *i.e.*, his company's engagement by the [law] firm -- creates a reasonable perception that his judgment might tend to be impaired in the matter [before the Board]. We conclude that it does. In our view, a reasonable person could question whether [the Board Member's] work for the firm would be a factor in his decision-making process. For instance, it would not be unreasonable for one to question whether he would, even subconsciously, consider the possibility that [Petitioner] would use her position as a partner in the [law] firm to affect, either positively or negatively, his work for the firm (or the likelihood of obtaining further work), depending on how he ruled on the matter [before the Board].

Positing this possibility in no way suggests that [the Board Member] would actually consider the ramifications of his decision on his work with the [law] firm or that [Petitioner] would take any action based on how [the Board Member] ruled. Under the objective standard that applies in conflict of interest cases, however, the Commission is required to determine whether a reasonable member of the public might harbor these concerns. (Emphasis added.)

Similarly, a reasonable member of the public would be concerned that your interest in Spouse's continued ownership of and employment with Business X might become a factor in your decision making. One may conclude that you want Spouse to continue her ownership of Business X. A natural consequence of your interest in Business X is that it "may tend to impair" your work on behalf of the city. In other words, a reasonable person could infer that you may consider the affect of the city's position in matters where Business X represents clients in matters involving the city. We do not imply that you would actually consider the financial interest in your decision making, but your impartiality may reasonably be questioned. As a result, the accounting wall would not remove the conflict of interest in regard to Spouse's ownership of Business X.

## **B. Conflict of interest based on close personal relationships**

In reliance on RCH Secs. 11-101 and 11-103,<sup>3</sup> the Commission has opined that conflicts arising from personal relationships that "might reasonably tend to create a conflict with the public interest" are prohibited. For example, in Advisory Opinion No. 2008-1, the Commission noted a board member's adult son and his family lived near the property, the use of which the board was examining. Although the son was not among the petitioners, the Commission stated:

. . . [I]t is not unreasonable to assume that, given his proximity to the proposed construction site, he and his family would be impacted by the proposed project. For instance, the proposed new school buildings might increase traffic and noise in the neighborhood, affect home values, *etc.* Consequently, a reasonable person might conclude that [the Board Member] would take into account these potential impacts on his son and his family when deciding the H matter.

In Advisory Opinion No. 184, the Commission opined that a personal relationship between a city officials and persons who have business with their agencies could result in a conflict of interest:

The Commission believes personal relationships could influence an officer or employee. For example, if a close friend asks a favor, the request may be difficult to refuse. Absent a request, the mere existence of a relationship may influence the officer or employee. In any event, the friendship will create the appearance of a conflict of interest if the friend is subject to the discretionary authority of the officer or employee to enforce the law.

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### <sup>3</sup> **Section 11-101. Declaration of Policy --**

Elected and appointed officers and employees shall demonstrate by their example the highest standards of ethical conduct, to the end that the public may justifiably have trust and confidence in the integrity of government. They, as agents of public purpose, shall hold their offices or positions for the benefit of the public, shall recognize that the public interest is their primary concern, and shall faithfully discharge the duties of their offices regardless of personal considerations,

### **Section 11-103. Disclosure of Interest --**

Any elected or appointed officer or employee who possesses or who acquires such interests as might reasonably tend to create a conflict with the public interest shall make full disclosure in writing to such person's appointing authority or to the council, in the case of a member of the council, and to the ethics commission, at any time such conflict becomes apparent. Such disclosure statements shall be made a matter of public record and be filed with the city clerk. Any member of the council who knows he or she has a personal or private interest, direct or indirect, in any proposal before the council, shall disclose such interest in writing to the council. Such disclosure shall be made a matter of public record prior to the taking of any vote on such proposal.

Accordingly, the Commission extends the general rule to state as follows: city personnel should not have personal relationships, such as sexual, platonic, or business, with parties who regularly have business before their city agencies. If such a relationship exists, the personnel should abstain from official action concerning friends. Similarly, if friends on occasion happen to have business before their agencies, personnel should abstain from official action concerning the friends. Overall, at the time matters first come before city agencies, personnel should disclose relationships to supervisors and disqualify themselves from taking official action concerning friends.

This statement regarding "personal relationships" is very broad and should be construed with regard to the facts of each case and should focus on close personal relationships. Recently, the United States Supreme Court upheld as a reasonable regulation a statute which required disqualification from participation or voting at a state legislature resulting from a conflict of interest created by a personal relationship. The legislator in question had a disqualifying conflict because of his relationship with a long-time friend and former campaign manager. See Nevada Commission on Ethics v. Carrigan, 131 S. Ct. 2343, 2347 (2011)

To the extent that you have a close personal relationship with anyone that has matters involving the city, you may have a conflict of interest that would disqualify you from participating in a particular matter. We request that you contact the Commission for advice if such a situation arises.

## **V. Conclusion and recommendations**

In summary, the accounting wall will divest your financial interest in income from Business X, and thereby remove the conflict arising from that income source. Also, Spouse would not work on any matters for involving the city. But, these steps do not remove the public concern arising from the interest in Spouse's continued ownership of Business X.

If you recuse yourself from matters where Business X represents a client in matters involving the city and you delegate your duties to another city officer, this will eliminate your ability to affect those matters. Consequently, you, the Department, and the city would be safeguarded against even an appearance of a conflict of interest, regardless of whether the interest stems from Spouse's income from or ownership in Business X. We are mindful of your desire to be a highly effective city officer and to lend your considerable skills to protecting the interests of the city. But, if you are involved in Business X matters involving the city, your

integrity will be questioned by the public because of your indirect financial interest in Business X.

The Commission recommends that you disclose each and every conflict where Business X represents a client in a matter involving the city. RCH Sec. 11-103 requires that a full written disclosure be submitted to your appointing authority. The conflict disclosure will become a matter of public record. You should remove yourself from participating in each such matter and delegate the authority to pursue and manage the case to an appropriate city officer. The city officer should be authorized to make decisions and take official action without your approval or involvement. The city officer would report through a chain of command without you taking part. The same process of disclosure, recusal and delegation should be followed for any matter where you have a close personal relationship with an individual or business representing a client in a matter involving the city.

APPROVED AS TO FORM  
AND LEGALITY:

/S/  
CHARLES W. TOTTO, Executive Director and  
Legal Counsel

DATED: December 19, 2011

/S/  
GERI MARULLO, Vice Chair  
Honolulu Ethics Commission